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# In the Supreme Court of the United States

OCTOBER TERM, 1957

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| THE IVANHOE IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.* | No. 122 |
| THE MADERA IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.* | No. 123 |
| THE MADERA IRRIGATION DISTRICT, et al., *Defendants and Appellants,* vs. PHILLIP and JANE E. ALBONICO, *Plaintiffs and Appellees.* | No. 124 |
| THE SANTA BARBARA COUNTY WATER AGENCY, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.* | No. 125 |

On Appeal from the Supreme Court of the State of California

## Appellees' Reply to Brief for the United States as Amicus Curiae

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On Appeal from the Supreme Court of the State of California

## Appellees' Reply to Brief for the United States as Amicus Curiae

Appellees' position, as fully developed in our main brief, may be quickly summarized as follows: Since the decisions below rest on an adequate state basis, the appeals should be dismissed and certiorari denied (Point I).

If a substantial federal question is deemed to be involved, the Supreme Court of California correctly answered it,

because Congress has deliberately elected to proceed solely on the basis of contracts with state-created agencies, and to leave the control, appropriation, use and distribution of water for irrigation purposes within state jurisdiction (Point II).

Indeed, pursuant to the power available to it—that is, the power to tax and spend for the general welfare (and, perhaps, to acquire and dispose of property)—Congress under the Federal Constitution could not have done otherwise than to respect state jurisdiction in these matters (Point III).

Further, consideration of the grave constitutional questions presented under the Fifth and Fourteenth Amendments provides additional grounds in support of the decisions below (Point IV).

With a single exception referred to in the last sentence of this paragraph, nothing in the brief for the United States as *amicus curiae* challenges the logic of the foregoing analysis. That is, it is not contended that if appellees are right as to Point I, the appeals should not be dismissed and certiorari denied; or that if appellees are right as to Points II or III or IV, the judgments below should not be affirmed. Accordingly, we will deal with the Government's arguments under the point headings stated at the opening of this brief (Points I, II and III, *infra*).[1] The single exception refers to the argument, introduced in the concluding two pages of the Government's brief, that the United States has title to or "paramount rights" in all California waters; this we deal with under Point IV, *infra*.

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1. Since the Government makes no attempt to meet the arguments under the Fourteenth and Fifth Amendments advanced in Point IV of our main brief, we do not deal further with that subject in this brief.

## ARGUMENT

### I. This Court Should Refuse Jurisdiction Because the Judgment, in Each Case, Rests on an Adequate Non-Federal Basis and No Substantial Federal Question Is Presented.

The basis for denial of review by this Court was fully presented in appellees' motion to dismiss and supporting brief, and in our main brief at pages 29-47. The Supreme Court of California held that, within the meaning of the pertinent Section 23200 of the State Water Code, the instant purported contracts contain terms not based on "applicable" law, *within the meaning of the state statute*. Indeed, the court reasoned that had the Legislature attempted to authorize contracts with such provisions, it would have run afoul of both *state* constitutional and statutory law. (See, *e.g.*, AJS 50-51, 56, 58-59; appellees' main brief, pp. 37-38, 42-43.)

The United States, like appellants, nevertheless insists that the decisions below are based on the court's determination of the invalidity of federal law, the former's brief for the most part adopting the latters' on this point. (U.S. Br. pp. 31-34.) As we have pointed out, this contention will not survive analysis. One passage of the Government's brief in this connection, however, is sufficiently arresting to require comment. After repeating the erroneous argument that the court below held the contracts invalid on the ground that the Bureau of Reclamation lacked the authority under the Federal Constitution to require certain of their terms, the brief continues (p. 34):

> "The result of this approach was that the court did not order the irrigation districts to refuse to accept reclamation water, but instead held that the conditions on the delivery of the water were illegal. If the court had proceeded on a state ground, it would have barred the state agencies from receiving the federal bounty;

> proceeding, as it did, on the federal ground, the court held them entitled to contract for the water but held the disputed conditions illegal. It thus appears that the California court consciously and purposely rested its decision on a federal ground rather than on an interpretation of its own laws."

It is true, as the foregoing passage states, that the Supreme Court of California did not bar state irrigation districts from accepting "reclamation water". The court below recognized the authority of irrigation districts, under state law, to contract with the Federal Government for water delivery and related matters; but the contracts were held invalid because in certain particulars they simply failed to conform to state law.[2] This, the foregoing-quoted passage seems to assert, shows that the court below "consciously and purposely rested its decision on a federal ground" because, had it proceeded on a state ground, it would have barred the state agencies from all such dealings, rather than barring, as it did, only specified illegal terms or conditions.

The conclusion thus sought to be drawn is not justified. A decision that state irrigation districts might not lawfully contract with the Government on *any* terms would have been consistent with a holding that the federal reclamation program was unconstitutional. On the other hand, the decision which the court in fact reached—that districts could lawfully contract, barring only certain unauthorized terms and conditions—is plainly consistent with its reliance upon state law. We submit that the Government's brief, although starting from the right premise—that the court below did not bar

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2. Thus, the Supreme Court of California rejected appellees' contentions as to the invalidity of certain provisions of the contracts (AJS 62); the contracts were held invalid as a whole on the familiar and proper principle that this result follows if a contract is invalid "on one material ground" (AJS 11). The substance of this footnote was called to the Court's attention in appellees' main brief, pp. 31, 32.

lawful contracts—, has reached exactly the wrong conclusion.

Moreover, a few pages later in the Government's brief the sentence appears (p. 35):

> "The California court has now determined that the 160-acre limitation and the repayment provisions of the contracts are *inconsistent with state law* requiring the proportionate distribution of water for irrigation (Cal. Water Code, Sec. 22250) and the right of landowners to receive irrigation water." (Emphasis ours.)

This, of course, is precisely the position that we have urged before the Court since the filing, last June, of our motion to dismiss.

What the Government's position comes down to, on our analysis, is this: Even though the Supreme Court of California, in holding the contracts invalid, *thought it was doing so on the basis of state law and said so in its opinions*, federal law is necessarily involved since it controls and, by its force, the contracts must be held valid. If the position of the Government or appellants now comes down to this, as we think it must, both have uselessly employed a good many words in attempting to construe the opinions below into saying what they do not say. On this basis, appellants and the United States in seeking review by this Court gain no help from the opinions of the court below but must rest their arguments for jurisdiction on the same argument both are ultimately driven to on the merits—namely, that federal law overrides state law to validate the contracts.

In short, on the jurisdictional question it seems to us that both appellants and the United States are driven to this position: Whatever the court below thought or said, federal law requires validation. Inquiries by the state courts as to the contractual capacity of state irrigation districts under state law, the state law of waters, etc., are futile because the result of validation follows, whatever the answers to these

questions. The congressional requirement for validation of such contracts leaves no judicial inquiry open to the state courts. Contract, validation, local irrigation districts—all are simply mechanisms to effectuate an exercise of federal power.

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Under this Point I, comment is also in order as to certain statements made in an effort to establish the interest of the United States in these cases and the substantial identity of its views with those of the executive and legislative branches of the California government. (Br., pp. 28-31.)

In the latter connection, the Government makes the following assertion:

> "As emphasized by the brief for the appellants (Br. p. 20), there is no clash here between the United States on the one hand and the legislative and executive branches of the State of California on the other. The impasse and the present situation are the result of the action of the California courts, at the instance of minority parties, in refusing to confirm the execution of the contracts between the United States and the irrigation districts." (Br., p. 28; footnote omitted.)

This statement is not supported by reference to any facts and is erroneous. The Ivanhoe and Madera contracts were specifically the subject of a comprehensive investigation by the Joint Committee on Water Problems of the Legislature of the State of California. As a result of the recommendations of this Committee, the Legislature of the State of California adopted two resolutions,[3] memorializing the

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3. Senate Concurrent Resolution No. 8 (Stat. 1953, Ch. 4, p. 272), introduced by Chairman J. Howard Williams at the 1952 Regular Session, adopted by a vote of 22 to 0 in the Senate and 61 to 0 in the Assembly, and an identical Assembly Concurrent Resolution No. 2 (Stat. 1953, Ch. 4, p. 405), introduced by Vice-Chairman Cloyed at the 1952 First Extraordinary Session, adopted by a vote of 56 to 0 in the Assembly and 27 to 0 in the Senate. These resolutions are referred to in our main brief, p. 38, fn. 9.

Director of Public Works and the State Engineer, as follows:

"1. That, in issuing permits and licenses to appropriate water for federal reclamation projects, due consideration be given to the possibility and desirability of issuing such permits and licenses to appropriate water for irrigation purposes to the contracting public agencies of the State rather than the United States.

"2. That licenses issued to the United States for irrigation purposes in connection with federal reclamation projects be limited to water subject to contracts between public agencies of the State and the United States which the State Engineer finds to be in the public interest and to conform to state law and that any permits and licenses issued for such purposes contain, in the public interest, the following conditions among, but not to the exclusion of, other conditions:

"(a) That the beneficiaries of each permit and each license are and shall be the public agency or agencies of the State together with the owners of land within such agency or agencies to be served with the water appropriated under the permit and license.

"(b) That the rights of the agencies and owners of land within the agencies to be served with the water appropriated under the permits and licenses are, subject to continued beneficial uses, permanent and appurtenant to the lands upon which the water is used.

"(c) That the use of water appropriated under the permits and licenses are subject to the reasonable requirements of the watershed or area wherein the water originates or area immediately adjacent thereto that can be conveniently supplied with water therefrom; and that no transfer of water of one watershed or area of origin to another watershed or area shall be consummated unless and until provision is made to meet such reasonable water requirements of the former; * * *"

The California Legislature continued to take an active interest in the progress of the *Ivanhoe* and *Madera* cases, and, in May of 1953, Senate Joint Resolution No. 35 (Stat. 1953, Ch. 159, p. 4170) was adopted, calling upon the Federal and state agencies involved to renegotiate the water delivery contracts in the Central Valley Project on the basis of eliminating therefrom all features held invalid by the trial court in the *Ivanhoe* case.

Shortly thereafter the California Legislature again acted to protect the integrity of state law, by adopting Senate Concurrent Resolution No. 80 (Stat. 1953, Ch. 196, p. 4235), calling upon the Water Project Authority and the State Engineer to appear in the appellate courts in order to present their views, which were inconsistent with those of the Attorney General of the State of California.

Again, in 1955, the California Legislature, pursuant to an amendment to the State Constitution (Article XIV, Section 4) adopted in 1954, amended Section 126 of the State Government Code, granting consent to the acquisition of lands within the State of California by the Federal Government. The effect was to condition such consent (among other conditions and reservations) as follows:

> "In granting this consent, the Legislature and the State reserve jurisdiction over the land, water and the use of water with full power to control and regulate the acquisition, use, control and distribution of water with respect to the land acquired." (Government Code, Section 126 (h).)

In addition, although the California Legislature has met many times since the decisions of the trial courts in the *Ivanhoe* and *Madera* cases were handed down, it has not attempted to enact legislation which would in any way contravene the state's rights as set forth in the decisions appealed from.

The Government's brief refers to the size of the Central Valley Project and to the large sums involved, characterizes the decisions of the Supreme Court of California as creating an "impasse" and a "serious interference" with the operation of the project, and states that as a result the federal reclamation program in general is "seriously prejudiced." (Br., pp. 28-29.) If all this were true, it would not in itself, of course, present a reason for review by this Court unless the requirements of appellate jurisdiction were satisfied.

We submit, however, that the Government's statements as to "impasse", "serious interference" and the like are not descriptive of a factual situation, but are merely a recast of its legal argument. That is, if we are correct in our view that the Bureau of Reclamation is bound to follow the congressional mandate expressed in Section 8 of the Reclamation Act of 1902, no such horrendous situation exists, and the Bureau will simply now proceed to conform its contracts to state law. Similarly, if Congress meant what it said when it required the Bureau to proceed solely by contracts with state-created agencies, and provided that such contracts be confirmed by state judicial proceedings before they became binding, there is no basis for alarm. If appellees are right, the decisions below have created no impasse, interference or prejudice with respect to federal reclamation or federal-state cooperation in this field; rather, these decisions have rid the atmosphere of mistaken concepts of federal power and reaffirmed, in accord with the congressional plan, the integrity of state water law.

Finally, it should be noted that the United States protects itself by a *caveat* of lack of jurisdiction, contending that in any event it cannot be bound by the decisions in the instant cases since it was not and is not a party. (U.S. Br., pp. 29-31.) We do not see that the Government's discussion of this subject contributes anything constructive to the present

cases. If the Government is not bound by the judgments herein, that would be an additional reason for denial of review; it throws no light on whether the decisions below should be affirmed or reversed. Whether or not the United States is bound as a party, it is perfectly clear that the judgments will effectively operate to validate or invalidate purported contracts to which it is a party, Congress obviously having intended that the validity of such contracts be so determined by precisely this type of proceeding. And a reaffirmation by this Court of the force of Section 8 of the Reclamation Act of 1902 may be expected to have its appropriate impact on the executive agencies of the Federal Government, whether by way of *res judicata* or *stare decisis*.

**II. Federal Law Leaves to State Jurisdiction the Capacity of Irrigation Districts to Contract and the Control, Appropriation, Use and Distribution of Water for Irrigation Purposes.**

This point is dealt with in appellees' main brief at pages 47-63. We there analyze the federal statutes involved and show that Congress has deliberately elected to proceed solely by way of contract, with such state-created agencies as may be authorized to enter into the prescribed contracts under state law, and has deliberately elected to leave the control, appropriation, distribution and use of waters for irrigation purposes within state jurisdiction. In this connection, we have also pointed out that the Bureau of Reclamation has reported to Congress that it is proceeding under state water law, and we show that in California the Bureau presently is processing applications for the appropriation of state waters before the State Water Rights Board, under California law. Further, we show that the repeated decisions of this Court confirm that it is the congressional policy to leave such irrigation matters within state jurisdiction. Finally, we show that appellant's con-

tentions, if adopted, would emasculate Section 8 of the Reclamation Act.

The Government's argument with respect to our Point II is set forth in its brief, at pages 34-48, under a topic heading which asserts only that Congress "Has Authorized" the inclusion of the 160-acre limitation and other provisions in contracts to be entered into by the Bureau of Reclamation and state irrigation districts. With this heading, standing by itself, appellees would not necessarily disagree (apart from the constitutional questions discussed in our main brief, Point IV); that is, it may be assumed that Congress has so authorized the inclusion of the 160-acre limitation *where permitted by state law*. As a reference to its brief will show, the Government's argument, however, goes considerably beyond its heading. What it is really arguing is that Congress has not merely authorized but *required* the inclusion of the 160-acre limitation and the denial of a permanent water right *regardless of state law*.

Acknowledging the existence of Section 8 of the Reclamation Act of 1902, which explicitly adjures respect for state water law, the Government nevertheless argues that this section is qualified or superseded by Section 5 of the same Act and by later statutes, including Section 46 of the Omnibus Adjustment Act of 1926. Hence, the Government invokes authority for the proposition that the specific (allegedly, Section 5) controls the general (allegedly, Section 8), and that later enactments prevail over earlier. (U.S. Br., p. 38.)

Although we believe that the Government's position has been answered in our main brief, a further specific application of what we believe to be correct principles to the Government's argument would seem to be in order. What follows supplements our main brief at pages 60-63.

(1.) In the first place, it will be seen that the Government's argument gives little if any, force or effect to Section 8 of the 1902 Act, since it would impose the 160-acre limitation and deny a permanent water right, notwithstanding the explicit requirements of this time-honored section. In our view, on the other hand, specified contractual provisions, including Section 5, may readily be reconciled with Section 8 when it is understood that they may apply to the extent consistent with state law. All provisions are thus subjected to a mutual accommodation and given due effect.

That such a reconciliation produces substantial and constructive results is shown by a reference to the instant contracts. Although they were held invalid by the court below, this result was reached due to relatively few errors of inclusion and exclusion. Most of the provisions of the contracts prescribed by federal law the court below found unobjectionable.

The applicable cases, rather than those cited by the Government, are therefore those holding that wherever reasonably possible all provisions of a statute must be given effect, and none may be deemed surplusage. Cases applying this rule are *United States v. Menasche*, 348 U.S. 528; *Markham v. Cabell*, 326 U.S. 404, 409; *McDonald v. Thompson*, 305 U.S. 263, 266. See 2 Sutherland, *Statutory Construction*, 3d ed., Section 4705. As the *Menasche* case put it (348 U.S. at pp. 538-539):

> "* * * 'The cardinal principle of statutory construction is to save and not to destroy.' *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30. It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair v. Ramsdell*, 107 U.S. 147, 152 * * *"

(2.) The Government's argument ignores the fact that Section 8 of the Reclamation Act of 1902 has been re-enacted and reaffirmed by the Congress as late as 1956.

Act of July 2, 1956, Section 4, 70 Stat. 483, 43 U.S.C. 485h-4. Similarly, the Government in this connection is silent as to the policy of respect for state water law unmistakably expressed in the Act of July 10, 1952, Section 208(a), 66 Stat. 549, 43 U.S.C. 666(a). In the light of these statutes, it would seem that the Government's reliance upon Section 46 of the Omnibus Adjustment Act of 1926 as "the later enactment by 24 years" (Br., p. 38) is wholly misplaced.

(3.) Similarly, the Government gives no weight to the actual practice of the Bureau, as reported to the Congress, in respecting state water law and seeking appropriations from state authorities under such law. (Appellees' main brief, pp. 51-52.) From the Government's argument on this point, one would have no inkling that this has been the consistent practice of the Bureau or, much less, that at the very moment of the filing of this brief the Bureau has pending applications for the issuance of appropriation permits under California law before the California State Water Rights Board, sitting at Fresno. (Appellees' main brief, p. 52.) Nor does the Government express its views as to the conditions heretofore imposed by the California State Engineer and State Water Rights Board in issuing appropriation permits on applications filed by the Bureau of Reclamation. (Appellees' main brief, pp. 19-21.) Those conditions are utterly inconsistent with any right in the United States to control and distribute waters obtained under such permits in a manner contrary to state law.

Is it the position of the United States that, pursuant to Section 8, the Federal Government in appropriating water must proceed in accordance with state law, but that, having so appropriated, it may handle and deliver the water in disregard of state law and pursuant to the Government's claimed interpretation of Section 5? If this is its position,

a most curious result would follow, and one which Congress certainly never intended. Under this view, the United States would receive rights to water only as permitted under state law, but, having received the water, could disavow state restrictions implicit or explicit in the grant and enjoy a greater title than it received. But if the Federal Government must be invested with a magical power to give a greater title than it receives, why bother to appropriate under state law in the first place? No such purpose can be fairly attributed to Congress.

(4.) The Government ignores the decisions of this Court cited in our main brief to the effect that Section 8 prevails in the field of irrigation. In fact, of the cases cited in our brief (pp. 53-60) only two or three are even mentioned by the Government, and none for their holdings as to the force of Section 8. Yet it seems evident that the Government's attempt to neutralize Section 8 cannot succeed unless these cases are overruled.

(5.) Finally, the Government's effort regarding Section 8 is in the face of the congressional decision to proceed solely by means of contract, with state-created agencies and to require the validation of such contracts in the state courts. This requirement, as specifically set out in Section 46 of the Omnibus Adjustment Act of 1926, could not express more clearly a congressional purpose to leave the capacity of one party to the contract, namely the state-created agency, entirely up to the law of the state. Thus, if, contrary to what we believe to be the fact, Section 8 should be held to be qualified or superseded, it still would not follow that the instant contracts are valid. That remains a question for the state courts to answer.

Apparently aware of this gap in its logic, the Government's Point IV contains the queer heading (p. 49):

"The Federal Government has Constitutional Power to Impose the Disputed Contractual Requirements"

The strange doctrine that contractual requirements may be imposed we deal with under our next point. At present it suffices to say that, whatever the constitutional power in this regard, the Government's brief makes no effort to show that Congress has attempted to create irrigation districts, or invest them with contractual power, or has done other than to leave these matters within state jurisdiction.

For these reasons, we submit that the Government does not establish its case by dwelling upon the size of the project, and the amounts of the appropriations authorized by Congress. It has failed to face up to the intent of Congress, the practice of the Bureau itself respecting state law, and the numerous decisions of this Court insisting upon the force of Section 8 of the Reclamation Act of 1902.

## III. The Available Federal Constitutional Powers Are Ineffective to Require Validation of the Contracts by Force of Federal Law.

It is not anticipated that the Court will need to deal with any question of constitutional power. This is due to the plain congressional mandate, discussed under Point II, to proceed solely by way of contract with such state agencies as under state law have the requisite authority, and to leave the control of water for irrigation purposes to state jurisdiction. We reach this point in the argument only on the assumption (contrary, as we maintain, to the facts) that Congress has used the device of a contract, not in the usual sense to denote a consensual undertaking, but merely as a means to impose various terms and conditions by sheer force of federal power.

The Government's brief evidently contends that Congress has so attempted to use its contracting power as a means

of exercising its regulatory authority. Hence, the Government argues that it has "Constitutional Power to Impose the Disputed Contractual Requirements" (Br., p. 49). Again, for the reasons developed under Point II, we submit that Congress has not sought to interfere with state jurisdiction in irrigation matters and that any claim that Congress has done so is specious. We further take issue, however, on the ground that, even had Congress attempted to assume jurisdiction over state irrigation districts and waters, it could not have done so under the only powers available to it.

Our position in this matter is developed in appellees' main brief at pages 63-76. We there point out that the congressional power to legislate in connection with the Central Valley Project and the Cachuma unit is under the welfare clause of the Federal Constitution (and possibly the property acquiring and disposing power); that the power of Congress to act under the welfare clause and the property disposing power is a limited one, as established by the prior decisions of this Court; and that under these powers the Congress may not override state law.

The Government's brief discusses this matter at scattered places under its Point IV, which has the heading above referred to regarding constitutional power "to impose" contractual requirements. The Government's first point is that the two irrigation projects here involved are based upon the Federal Government's constitutional power under the general welfare clause, and under the property clause (U.S. Br., pp. 49-50). This entirely accords with our own analysis (appellees' brief, pp. 63-66) except that reference to the property power in this connection should be noted with some caution. That is, we are not here dealing with the public domain, but with water rights or other property which the

Federal Government has acquired or is in the process of acquiring for the effectuation of these particular irrigation projects.[4]

Secondly, the Government argues that it may impose reasonable conditions on the receipt of federal monies and the use of federal property (Br., pp. 50-53). From this, the brief concludes that Congress has constitutional authority "to impose" the contractual requirements in question.

(1.) The vice of the Government's argument rests, first of all, in its failure to face up to the fact that what is here involved is not merely conditions, reasonable or otherwise, but conditions which attempt *to override state law*. Cases cited for the proposition that the Government may impose reasonable conditions on the receipt of federal monies and the use of federal property (U.S. Br., pp. 51-52) are hence pertinent only where they involve the overriding of state jurisdiction.[5]

(2.) But such cases must also be subjected to a further test, which is this: What is the constitutional source of authority for the overriding of state law? Is the authority asserted one of the regulatory and coercive powers of the Federal Government, such as the power to regulate commerce, to coin money and prevent others from doing so, to establish post offices, to raise and support armies, and the like, or, to the contrary, is the power involved merely that of spending for the general welfare and of making rules and regulations concerning the disposition of Government property? The Government's brief assumes, *without discussing or in terms even recognizing the problem*, that the federal

4. We discuss the general subject of the United States' rights with respect to California waters under Point IV, *infra*.

5. None of the cases cited at pages 51-52 of the Government's brief involved the disposition of federal monies or property on terms or conditions inconsistent with state law.

authority to impose terms and conditions, even though in conflict with state law, is as broad under the general welfare clause as under the power to regulate commerce, etc. This cannot be so.

As we have pointed out in our main brief (pp. 67-69), unless a distinction is drawn between the general welfare (and property acquiring and disposing) powers, on the one hand, and the regulatory and coercive powers on the other hand, it is idle any longer to speak of a Government of limited powers. For if no such distinction existed, the Federal Government by the simple process of spending, purchasing or condemning, and then disposing of, on any terms which might be justified as contributing to the general welfare, could override state law in any field in which the Federal Government pleases. This, we submit, would be the inevitable effect if no distinction is drawn among the various federal powers.

Consistent with its failure to discuss or even recognize what we submit to be the true problem, the Government's brief cites only two cases which appear to involve the imposition of terms and conditions contrary to state law. (And neither is cited for this point.) These are *Public Utilities Commission of the State of California v. United States*, No. 23, this Term, decided March 3, 1958; and *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187. (U.S. Br., p. 53.) These cases in fact point up the distinction we have made, since both rest on an exercise by the Federal Government, not of its general welfare or property powers, but of its power to maintain the military establishment for the defense of the country.

Similarly, the Government's brief gives no heed to the cases cited in our main brief (pp. 67-74) for the proposition that the power of Congress to act under the welfare clause (as well as the property clause) is limited. Cases which

squarely make this distinction are *United States v. Butler*, 297 U.S. 1; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288; and *Hopkins Savings Assn. v. Cleary*, 296 U.S. 315. Other cases applying the same or analogous principles are *Oklahoma v. Civil Service Comm'n.*, 330 U.S. 127; *Steward Machine Co. v. Davis*, 301 U.S. 548; *United States v. San Francisco*, 310 U.S. 16; *United States v. Bekins*, 304 U.S. 27; and *United States v. Burnison*, 339 U.S. 87.[6]

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6. Of these, the *Oklahoma*, *Steward Machine Co.*, *Bekins*, and *San Francisco* cases are cited by the Government, but only for the broad proposition that it may impose reasonable conditions on the receipt of federal monies and the use of federal property. (U.S. Br., pp. 51-52.) The Government reads these cases evidently as permitting the imposition of such conditions even where they override state law. In fact, none involved any conflict whatsoever with state law. We point out that the cases referred to do not impose conditions overriding state law but conditions accepted by the states. (Appellees' main brief, pp. 72-73.)

Also, in our main brief we pointed out that the condemnation case of *United States v. Carmack*, 329 U.S. 230 (U.S. Br., p. 56) is not in point because it involved an exercise not of the general welfare or property power but of the authority to maintain post offices and customs houses. (Appellees' main brief, p. 68, fn. 18.) Likewise, *Kohl v. United States*, 91 U.S. 367 (U.S. Br., p. 56), involved condemnation of land for a courthouse, custom house, etc. Nothing in Mr. Justice Strong's cautiously-constructed opinion in *Kohl* throws doubt on our analysis of the federal power under the general welfare clause.

Finally, we have heretofore pointed out the application and force of *United States v. Burnison*, 339 U.S. 87. (Appellees' main brief, pp. 73-74.) The Government's only answer to this is (Br., p. 66, fn. 25):

> "Since the court below recognized the power of the United States to acquire the water rights necessary to execute the project, cases such as *United States v. Burnison*, 339 U.S. 87, are irrelevant here."

We, of course, deny the authority of the United States, on both statutory and constitutional grounds, to acquire the "unlimited title" "necessary to execute the project." (Appellees' main brief, pp. 61-62, 67-68.) We know of no recognition by the Supreme Court of California of any such power.

We return, then, to the discussion of constitutional authority developed under Point III of our main brief. Assuming, for the sake of argument, that Congress had sought, by "imposing" contractual terms and otherwise, to override state law, it could not do so pursuant to the powers available to it under the Federal Constitution. This is so because the powers at the disposal of Congress are limited to spending for the general welfare and acquiring and disposing of property. These powers are indequate, in the words of the *Butler* and *Ashwander* cases, "to coerce action left to state control" (297 U.S. at p. 87) or "to govern the concerns reserved to the States" (297 U.S. at p. 338).

Finally, the last two pages of the Government's brief seek to inject into the litigation an alternate basis for the exertion of federal authority, and one neither raised by any party nor passed upon in the courts below. This is the proposition (U.S. Br., pp. 67-69) that California waters were originally vested in the United States along with the rest of the public domain, except in so far as express grants had been made by Spain or Mexico, and that the title to the unappropriated waters of California is, as a matter of federal law, not vested in the State of California. Hence, the argument runs that California, whether under a trust theory or otherwise, cannot legislate with respect to California waters as against the United States, and that the contracts must therefore be validated.

This, we apprehend, comes close to an assertion of "paramount rights". We respectfully submit that it was this doctrine, clothed in somewhat different language, which the Court rejected many years ago in *Kansas v. Colorado*, 206 U.S. 46 (discussed in our main brief at pp. 64-66). It is a doctrine utterly inconsistent with the entire line of cases decided by this Court and discussed at pages 53-60 of our

main brief. However, the Government having elected to assert this proposition, we answer it in some detail in our succeeding Point IV.

## IV. The Government's Assertions of Power Over California Water Are Untenable.

As we have mentioned, the Government's brief (pp. 67-69) advances the curious theory that the United States owns, or at least has the right to control, all unappropriated water in California. It is not clear whether this argument proceeds on the theory that the United States is sovereign over such water, as if it constituted a federal enclave, or whether the control of the United States over such water is thought to derive from its present or past ownership of public riparian lands. Neither view is tenable, as we shall show below.

It seems appropriate to observe, however, before going into these questions, that we fail to see why the issue is injected into these cases, apparently as an afterthought, with the suggestion that the present cases are not appropriate to resolve it. The Government specifically states that "It is unnecessary here to determine who has the title to unappropriated water." (Br. p. 68.) In any event, control, rather than title, would be the critical element; the same result reached by the trust theory follows from the state's authority to control.

Moreover, the issue is particularly irrelevant to these cases, since there is no showing that any "unappropriated" water is involved.[7] Necessarily, if all water involved in

7. The term "unappropriated," as used by the Government, we necessarily assume, excludes water with respect to which appropriative applications have been filed, pursuant to Section 1252 of the California Water Code, even though such applications have not pro-

these cases has been appropriated or is in the process of being appropriated, the issue is wholly foreign to these cases.

If the issue tendered by the Government must be met, it is well to pause at the outset and consider the consequences which would flow from the adoption by this Court of the Government's position. The contention that the United States owns all waters within the State of California, or by virtue of its sovereign capacity can control the use of such water, is indeed startling.[8] If one were to pick the single natural resource that has been most necessary for the growth and development of every state in the Union, that resource would of necessity be water. Even before the inception of our Nation, settlements were founded and towns and cities developed only where water was available for the inhabitants. The great metropolitan centers of our Nation's West have expended millions of dollars to provide an adequate water supply for the domestic use of their inhabitants and for the commercial use of their industries. In the western states, where irrigation is necessary for agricultural crops, private individuals, water companies, irrigation districts and the states themselves have expended millions of dollars for the development of the water supply, without which crops could not be grown.

One of the basic assumptions under which private individuals have invested the tremendous sums required to

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gressed to the point where licenses have been issued, pursuant to Section 1610 of the Water Code.

As we have pointed out in our main brief (p. 52) and at pp. 11 and 13, *supra*, the Government itself, through the Bureau of Reclamation, is actively pursuing such applications before the State Water Rights Board at the present writing. The futility of such proceedings, if the instant theory were correct, will be readily apparent. See *supra*, pp. 13-14.

8. The same proposition would seem to be applicable throughout the western states.

procure these urban and rural supplies of water was the assurance that, after the systems were constructed and the water put to use, the user acquired a valid and stable right under law to the continued use of the water supply. Thus the establishment of rights in the use of water under our laws has become and remains just as important as the establishment of valid titles to our lands.

Throughout the history of our Nation, our people have looked to the states and to state laws to determine the rights in the use of waters that are intrastate in character. The whole stability of our economy, domestic, industrial and agricultural, has its foundation on water rights acquired under state law.

If we were to adopt the theory that the United States holds the basic title to waters of the western states, then those who developed water and placed it to use under the assumption that state law prevailed were and are but trespassers against the rights of the United States. The titles which the users of water gained under state law would all be subject to extinguishment by the United States' reassertion of its purported right to the water, and the millions of dollars expended to acquire, develop and preserve the water supplies for our cities, factories and agricultural lands would have gone for naught. If this be the case, then that certainty which is required by the men who are the developers of our Nation and that stability of ownership which is a basic prerequisite for the investments of man's money or effort will no longer exist.

In any event, the issue tendered by the Government has long ago been resolved by this Court.

**A. The United States Is Not Sovereign Over the Internal Waters of Any State.**

A long line of cases, from *Pollard's Lessee v. Hagan*, 3 How. 212, through *United States v. California*, 332 U.S. 19,

holds that the states have full sovereign power over all waters within their boundaries, subject only to the navigational servitude and the right of the United States to such water as it may put to beneficial use on its own riparian lands. *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 702-03; *Port of Seattle v. Oregon & W. R.R.*, 255 U.S. 56, 63; *Fox River Co. v. Railroad Commission*, 274 U.S. 651, 655. This sovereign power was derived by the thirteen original states from the British Crown; they did not delegate it to the Federal Government, except to the extent just indicated;[9] and the other states, including California, were subsequently admitted on an "equal footing" with the thirteen original states.[10] *United States v. California*, *supra*; *Cardwell v. American River Bridge Company*, 113 U.S. 205. It does not result from the Desert Land Act, of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321, as the Government seems to suggest.

Such state sovereignty over internal waters necessarily implies the power to regulate the manner in which title to such waters may be acquired and the uses to which they may be put. This has been the uniform view taken by this Court. See, *e.g.*, *California Oregon Power Co. v. Beaver Cement Co.*, 295 U.S. 142; *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252.

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9. Thus, the navigational servitude results from the power over interstate commerce delegated to the Federal Government by Article I, Section 8, Clause 3 of the Constitution. We must also bear in mind the repeated holdings of this Court that sovereignty over property within a state can be acquired by the Federal Government only by that state's consent or cession. *Mason Co. v. Tax Comm'n.*, 302 U.S. 186, 197; *Wilson v. Cook*, 327 U.S. 474, 488; *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 539.

10. In the case of California, the relevant statute affording "equal footing" is the Act of September 9, 1850, Section 3, 9 Stat. 452.

The cases cited by the Government (Br., p. 68) certainly do not hold to the contrary. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, involved the use to be made of Government land. The Court's holding in that case was predicated upon an express representation that the project there involved would be carried out subject to "all existing rights to the use of the waters of the river, whether perfected or not." 349 U.S. at p. 441. In *Winters v. United States*, 207 U.S. 564, the Court did not reach the question of the sovereignty of any state. The decision turned upon construction of an agreement between the United States and certain Indians. *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir.), involved only the question of water rights reserved by the United States upon setting aside an Indian reservation. The court expressly recognized the sovereignty of the state over water rights and treated the United States no differently than a private owner of land. *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir.), certiorari denied, 352 U.S. 988, was to the same effect.

Finally, *United States v. Rio Grande Irrigation Company, supra*, also cited by the Government, expressly supports the sovereign rights of the states over their internal waters, as we have indicated above. The holding of the Court was there based upon a determination that the construction of a dam across the Rio Grande River would impair the navigability of the river; the decision rests on the overriding power of the United States with respect to navigation.

Congress has proceeded in all matters affecting internal waters of the states in full recognition of the principles expressed above. On at least nine occasions since 1866 it has admonished officials of the Government to respect water

rights acquired under state law.[11] The Act of July 10, 1952 is particularly significant. It provides, even where the United States has acquired title and is the owner of water rights, that the United States shall

> "be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty."

Another important consideration is the fact that Congress has never attempted to exert sovereign power over water by prescribing any overriding code of regulations for the appropriation and use of water. Indeed, in *Kansas v. Colorado*, 206 U.S. 46, *supra*, this Court held that Congress has no such power.

It seems apparent, therefore, that the rights of the United States with respect to California waters can rise no higher than the rights of an owner or former owner of riparian land. The Supreme Court of California summarized the situation succinctly in *Palmer Etc. v. Railroad Commission*, 167 Cal. 163, 168:

> "The United States, with respect to the lands which it owns in this state, is a riparian proprietor as to the streams running through such lands. It is only by virtue of that fact that it has any right or power of disposition over the waters thereof. And its right and power in that respect is no greater and no less than that of any other riparian proprietor."

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11. Act of July 26, 1866, Section 9, 14 Stat. 251, Rev. Stat. 2339, now 30 U.S.C. 51 and a part of 43 U.S.C. 661; Act of July 9, 1870, Section 17, 16 Stat. 217, Rev. Stat. 2340, 43 U.S.C. 661; Desert Land Act, of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321; Reclamation Act of 1902, Section 8, 32 Stat. 388, 43 U.S.C. 372, 383; Federal Power Act, Sections 9(b), 27, 41 Stat. 1063, 16 U.S.C. 802(b), 821; Boulder Canyon Project Act, Section 18, 45 Stat. 1063, 43 U.S.C. 617q; Taylor Grazing Act, Section 3, 48 Stat. 1269, as amended, 43 U.S.C. 315b; Act of July 10, 1952, Section 208(a), 66 Stat. 549, 43 U.S.C. 666(a); Act of July 2, 1956, Section 4, 70 Stat. 483, 43 U.S.C. 485h-4.

We therefore analyze the rights of such an owner under California law.

**B. The Rights of the United States as Landowner, Under State Law, Are Wholly Inadequate to Support the Powers Asserted.**

As we have shown, upon the admission of California to the Union, the United States, as owner of the public domain, held such water rights as were held by other riparian landowners in the state.

As a riparian landowner under the laws of California, the United States had and has only the following rights, in common with other such owners:

(1.) A riparian landowner, at least since the adoption in 1928 of Article XIV, Section 3 of the State Constitution, has the right only to such water as he can put to beneficial use on the riparian land itself. Riparian rights cannot be transferred unless the land itself is transferred. A purported conveyance of water rights by riparian landowners, apart from the land, merely frees the water for use by appropriators and other riparians. *Duckworth v. Watsonville Etc. Co.*, 150 Cal. 520, 526.

(2.) An appropriator may obtain a right to use water only by complying with the provisions in that respect set forth in the California Water Code (Division 2, Part 2, Chapter 2), including, since 1913, the filing of an application with and the obtaining of a permit from the State Water Rights Board or its predecessor. Such a permit is granted upon such conditions as the public interest may require (Water Code, Section 1253).

This, then, is the full extent of the rights of the United States with respect to California water, and it is by such rights that the Government attempts to justify an elaborate structure of federally imposed conditions, contrary in some

respects to state law as determined by the court below. These rights obviously will not suffice for the purposes asserted.

The Desert Land Act, of 1877, as well as earlier Acts,[12] were intended, as this Court has said, to effect a severance of land title from water title, under the circumstances therein provided. See *California Oregon Power Co. v. Beaver Cement Co.*, 295 U.S. 142, *supra*.

Water was thereby made available for appropriation free of the riparian rights of the United States and its patentees. In 1927, the California State Director of Finance filed applications, pursuant to state law, to appropriate water for the Central Valley Project. (See our main brief, p. 16.) As the Court below put it, the purpose of the enabling legislation was to

> "provide for the appropriation * * * of all of the unappropriated waters of the various streams of the state which might be needed for the coordinated plan of conservation in the central valleys". (AJS 13-14.)

As a result of the Desert Land Act and these filings, it is highly doubtful that the United States has any riparian rights with respect to the waters here involved. Its only rights would seem to be derived from the subsequent assignment of these applications to the United States, applications filed by the United States itself (see our main brief, pp. 19-20) and rights acquired by purchase or condemnation, which are discussed below. The Secretary of the Interior has so stated (R. 100).

Even to the extent that it retains riparian rights, they are of no avail in this case, for state law limits riparian rights to riparian land, and there is no contention that the

12. The Acts of 1866 and 1870, *supra*, p. 26, fn. 11.

United States intends to use any of the water here involved upon riparian lands owned by it.[13]

**C. Rights Acquired by Purchase or Condemnation Are Likewise Inadequate.**

In an attempt to bolster its position, the Government relies upon rights acquired from private individuals or corporations by purchase or eminent domain. Particular reference is made to acquisitions from Miller and Lux, Inc. (U. S. Br., pp. 66-67.) There are several answers to the claims based upon these acquisitions.

(1.) In the first place, the acquisitions from Miller and Lux and others were made pursuant to congressional authority for the purpose of carrying out the Central Valley Project, within the limits of the general welfare power, and not otherwise. As we have pointed out in our main brief (pp. 67-68), and in Point III, above, the United States is not constitutionally competent to use its powers under that clause so as to contravene state law.

(2.) Insofar as riparian rights of Miller and Lux and others are involved, such rights could not, under state law, be transferred as such to the United States. The most that the United States obtained was an extinguishment of those riparian rights, which freed the waters involved for appropriation by the United States. See p. 27, *supra*. Such appropriative filings remain subject to the terms and conditions to be imposed by the State Water Rights Board in the exercise of its powers under state law.

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13. The Government makes the cryptic assertion (Br., p. 68, fn. 30) that some of the water involved is derived from federal land. We are aware of no rule of law which would make this asserted fact relevant. The foregoing analysis makes it clear that even a reservation of federal lands would only preserve riparian rights in the United States and not create a sovereign control over the waters arising on such lands.

(3.) Moreover, all water rights acquired from Miller and Lux under the so-called "exchange contract" are dependent upon delivery to Miller and Lux of a substitute supply from the Sacramento River system, (Plaintiff's Exh. B-1, para. 7, *Ivanhoe*, Rep. Tr. 48, April 3, 1951.) Such a substitute supply can likewise be obtained only under a permit issued by the State Water Rights Board. In carrying out the Miller and Lux contract, and in full recognition of the powers of the State Water Rights Board, the Bureau of Reclamation has in fact filed applications to appropriate water of the Sacramento River system to supply the substitute requirement and has received a permit to impound and divert water at Folsom and Nimbus Reservoirs for delivery in partial fulfillment of the contract. (See appellees' main brief, pp. 20-21.) The use of such waters by the United States is and will be subject to the conditions imposed in permits issued or to be issued by the Board.

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The preceding discussion leads us again, by a different route, to the conclusion that state law is fully dispositive of all the issues in this case. The United States has no sovereign rights over inland waters of California, as repeatedly held by this Court, neither the navigational servitude nor any other regulatory power being here involved. Its rights as a landowner are irrelevant, since there is nothing in the record indicating that it owns any riparian rights involved in these cases. Its appropriative rights, whether derived by assignment from the State of California or by purchase or condemnation of private rights, are, and must be, wholly subservient to state law. The inevitable result, we submit, is that state law governs all these issues, as the Supreme Court of California held.

## CONCLUSION

Other points urged in the Government's brief would not seem to require further discussion. Its brief presents no impelling reason for the Court to review the instant cases, or if jurisdiction is exercised, to do other than affirm the decisions below.

Respectfully submitted,

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